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No. 681

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

ACME-EVANS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KURT F. PANTZER,

CHARLES M. WELLS,

Indianapolis, Indiana,

Counsel for Petitioner.

C. B. PAULEY & CO., INC.

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Petitioner Acme-Evans Company prays that a writ of certiorari issue to review the decree herein of the United States Circuit Court of Appeals for the Seventh Circuit (4A. 333-336[1]), and respectfully shows to this Honorable Court:

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[1] The appendix filed by the Board in the lower court was there, and is here, referred to as "P.A." The four volumes of the appendix filed by the company in the lower court were there, and are here, referred to as "1A.," "2A.," "3A.," and "4A." The proceedings after the petition for enforcement of the Board's order appear in 4A. pages 180 to 340.

Opinions Below

The opinion of the lower court (4A. 247-257) is reported in 130 F. 2d 477. The decision and order of the Board (P.A. 771-839) are reported in 24 N. L. R. B. 71.

Jurisdiction

On June 15, 1942, the lower court rendered its opinion and entered an order granting enforcement and denying the company's petition for leave to adduce additional evidence (4A. 258). The company filed a timely petition for rehearing (4A. 259-260) which was denied on September 29, 1942 (4A. 333). The decree of enforcement was entered by the lower court on December 7, 1942 (4A. 333-336). An order extending the time for filing a petition for certiorari to and including February 1, 1943, was signed by the chief justice of this Court on December 14, 1942 (4A. 339). This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended, 28 U.S.C.A. Sec. 347(a), and under Section 10(e) of the National Labor Relations Act, 29 U.S.C.A. Sec. 160(e).

Questions Presented

1. Whether the requirement of procedural due process is met where the National Labor Relations Board refuses to admit and consider evidence which is relevant and material to the issues, including (a) the issue of an employer's motives in discharging certain employees, (b) the issue of an employer's motives in not reinstating them, and (c) the issue whether "affirmative action * * * will effectuate the policies of" the Act.

2. Whether a petition for leave to adduce additional and excluded evidence which is relevant and material to such issues may properly be denied.

3. Whether procedural due process exists where the practice of the Board is that counsel for the employer, but not counsel for the Board, is required to submit to the Trial Examiner applications for subpoenas desired, specifying the names of the witnesses and the nature of the facts to be proved.

Statement

This case, involving the administration of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. Sec. 151 *et seq.*, arises out of the company's discharge of three employees—Lowell Chastain, a payroll clerk, and Ralph Moneymaker and James Nall, truck drivers,—in January, 1939; a subsequent strike extending from January to April, 1939; and the company's not reinstating certain striking employees.

The complaint, issued by the Board on March 27, 1939, recited the filing of charges against the company by Federal Labor Union No. 21873 (herein called the Federal) and by International Brotherhood of Teamsters & Chauffeurs, Stablemen and Helpers, Local Union No. 135 (herein called the Teamsters), both affiliated with the American Federation of Labor, and alleged that the company had violated various sections of the Act (P.A. 8-16). The answer as amended denied that the company had engaged in any unfair labor practices and alleged, among other reasons for the discharges and non-reinstatements complained of, that the unions and complaining employees had engaged in unlawful conduct, including violence and threats

of violence directed against the company's employees and property, and a conspiracy to obstruct by force the conduct of the company's business (P.A. 17-29).

Pursuant to notice (P.A. 16-17), a hearing was held before a Trial Examiner from March 27, 1939, to May 5, 1939. The examiner issued an intermediate report concluding that the company had violated Section 8(1), (3) and (5) of the Act, making recommendations accordingly (P.A. 551-628), and dismissing a petition filed by the Teamsters requesting investigation and certification of representatives, pursuant to Section 9(c) of the Act, which was heard with the complaint case (P.A. 834). Exceptions thereto filed by the company (P.A. 629-769), in which the company requested leave to adduce additional evidence which consisted of the documentary and oral evidence excluded by the Examiner at the hearing (and which, as the company will show, was relevant and material to the issues involved, particularly those referred to under "Questions Presented," p. 2, *supra*), were denied by the Board on May 29, 1940, except with respect to several exhibits which were admitted (P.A. 777-778), and the Board entered its decision and order against the company (P.A. 771-839).

Summarized, the Board's findings of fact were that in December, 1938 and January, 1939, the company, in violation of Section 8(1) of the Act, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, by inquiring and causing inquiries to be made concerning the employees' union affiliations and activities, by rewarding an employee's disclosure of information about such activities, by surveillance of the Teamsters' meeting places, by a statement of the company's vice-president, S. R. Harrell, to an em-

ployee which the Board construed as disparaging to unions, and by the reading by the company's plant superintendent of a statement dealing with personal activities of the employees on company time and property and directed at union activities (P.A. 782-789); that in violation of Section 8(3) of the Act, the company, by discharging Chastain, Moneymaker and Nall, discriminated with respect to their hire and tenure of employment (P.A. 795, 799); that as a result of said unfair labor practices about 55 of the company's employees went on strike on January 12, 1939, and commenced to picket the company's plant, the strike being attended by various altercations between striking and non-striking employees (P.A. 800-801); that when 11 strikers applied for reinstatement after January 24, 1939, the company, in violation of Section 8(3), discriminated against them by refusing to reinstate them to their prestrike positions and employing them as new employees in other positions, some of which paid less per hour (P.A. 805-807); that during the strike the company discriminated against four additional employees because of their support of and activities in the Teamsters and seven others because of their Federal membership (P.A. 807, 811-812, 813, 816, 817, 839); and that, in violation of Section 8(5) of the Act, the company, on February 10 and 18, 1938, refused to bargain with the Teamsters (P.A. 826-827), such union then being the duly designated collective bargaining representative of the company's employees within an appropriate unit (P.A. 821).

The Board stated conclusions of law accordingly (P.A. 834-835, 130 F. 2d 478-479) and entered an order requiring the company to cease and desist, reinstate, bargain and post notices (P.A. 835-838).

The Board filed its petition for enforcement dated June 13, 1941 (P.A. 1-6); the company filed its petition for leave to adduce additional and excluded evidence on February 25, 1942 (4A. 180-212), to which the Board filed its answer on April 17, 1942 (4A. 213-223). Further proceedings are related under "Jurisdiction," page 2, *supra*.

Specification of Errors

1. The court below erred in denying the company's petition for leave to adduce additional and excluded evidence.

2. The court below erred in granting the Board's petition for enforcement and entering a decree therefor.

Reasons for Granting the Writ

I. The decision below conflicts with *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197, 225-226; *N.L.R.B. v. Indiana & Michigan Electric Company*, (January 19, 1943); and *Donnelly Garment Company v. N.L.R.B.*, (C.C. A. 8) 123 F. 2d 215, 224, and cases there cited. Those cases firmly establish the principle that an administrative agency's refusal to admit and consider competent and material evidence results in an unfair trial and constitutes a denial of due process.[2] The reasons of Acme-Evans

[2] This Court, in the *Consolidated Edison* case, said (p. 226): "An offer of proof was made which showed the testimony to be highly important with respect to the *reasons for the discharge*. * * * the refusal to receive the testimony was unreasonable and arbitrary" (emphasis ours); and in the *Indiana & Michigan Electric Company* case, trenchantly pointed out: "Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." The principle is also well stated in the *Donnelly*

Company for the discharges and refusals to reinstate involved herein were specially pleaded in the answer (see p. 3, *supra*). Indeed, the employer's motives are always a vital issue in a trial of alleged unfair labor practices under the Act, as the Court recognized in the *Consolidated Edison* case, *supra*, and in *N.L.R.B. v. Nevada Consolidated Copper Corporation*, 316 U.S. 105.[3] Although the Board's findings were supported by substantial evidence (the company did not contend otherwise in the lower court, 4A. 302),[4] relevant and material evidence tendered by the company was rejected on important issues.

Garment Company case (p. 224): "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. * * * That the Board would or might have reached no different conclusion had the rejected evidence been received is entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered."

[3] There this Court said (p. 106): "Examination of the record discloses that there was substantial evidence from which the Board could have concluded that respondent's refusal to employ the men was motivated by its belief that they had engaged or threatened to engage in destruction of respondent's property and had threatened to injure some of respondent's managerial employees and members of their families. There was also substantial evidence from which the Board could have concluded, as it did, that respondent's motive for refusing the employment was discouragement of membership in a labor union."

[4] In view of the statement of counsel for the company at the beginning of his oral argument in the lower court: "I am not here, because of the decisions of the Supreme Court of the United States, to argue whether or not under existing law the Board had the power and therefore the right to make those findings; I am here to present to you whether or not the Board had the power to exclude absolutely material evidence, completely to disregard that material evidence, and then, in the light of the record so standing, to find against the respondent," the lower court's description of its function as "acting as a rubber stamp and entering orders required by the Board" (130 Fed. 480) seems inapposite.

1. *Motive in discharging Chastain.* The company sought to show that in discharging Chastain it was motivated, not by a desire to discriminate against him as claimed by the Board, but by his disclosure of information which was, and which he knew to be, confidential, by neglect of duty in amount of time spent in personal activities on the company's time and premises, and his continuance therein after instructions to refrain therefrom. Although enough evidence was admitted to result in a finding by the Examiner that a report that Chastain had disclosed such information "caused considerable consternation among the members of respondent's executive committee" and they "reached the conclusion that they had completely lost confidence in him in view of his disclosure of information relative to the wages received by employees, which they regarded as a breach of confidence" (P.A. 569), and findings by the Board that Stout, the company's secretary, "saw Chastain jotting down the pay rates of employees on a slip of paper" and that Chastian did not explain this incident (P.A. 793-4), much further evidence (included in the company's petition to adduce, 4A. 188-189) relating to the reasons for his discharge was rejected by the Examiner.[5] This would have shown that Chastain had not been a satisfactory employee and certain of the company's officials had objected to him; that he regarded his knowledge of the company's wage rates as confidential; that the company had notice of his union activities on the company's time and premises before and after instructing him in that regard, and that before discharging him the company's officials discussed and acted upon reports of his activities. Moreover, when counsel for the company sought to elicit direct testimony with respect to motive the

[5] This is set forth in 4A. 87-103.

Examiner sustained an objection.[6] This was clearly error.[7]

2. *Motive in discharging Moneymaker and Nall.* The Board contended that these men, who were members of the Teamsters, were discharged to discourage membership therein. The company sought to show that they had been guilty of misconduct, particularly threats of violence, which threats, in view of the Teamsters' past criminal acts and its very bad reputation for violence in and about Indianapolis, the company justifiably believed to be serious. Although Moneymaker and Nall denied threatening serious bodily harm to two other truck drivers of the company whom they had been soliciting to join the Teamsters, the Board found that the threats were actually made (P.A. 796).[8] The Examiner excluded, however, much other proper evidence on the issue of motive[9] which would have shown that Moneymaker and Nall had been guilty of violating the company's rule against indulgence in personal activities on company time and premises, that their union

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[6] Counsel stated, in discussing admissibility of such testimony, that "it seems to me that the only fact that is being excluded is the state of mind and the fairness and the motive of the witness, and one of the ways of proving state of mind and motive is by the declaration of the witness on the stand as to what was in his mind at a certain time. I think Wigmore has a whole chapter on that" (1-A. 379). Although Wigmore does not have a whole chapter on the subject, his full discussion of the point indicates that in only one jurisdiction, Alabama, has any clear sanction been given to a contrary rule. Vol. 2, Wigmore on Evidence, (3rd Ed.), Sec. 581, pages 714-721.

[7] See in addition to the text cited in the preceding note, *Crawford v. U. S.*, 212 U. S. 183, 202-204; *Chicago, etc. R. Co. v. McKenna*, (C.C.A. 8) 74 F. 2d 155, 157-158; *White v. State*, 53 Ind. 595, 596-597; *Seymour Water Co. v. Lebline*, 195 Ind. 481, 492-493.

[8] These threats, to the effect that the two other employees would have to be sent home in an ambulance if Moneymaker and Nall lost their jobs, even if the latter had to go to jail (P.A. 796), perhaps were not impressive, standing alone, but in the light of the Teamsters' past violence, the threats were dire.

[9] The Board admitted a report (Exhibit 130, 3A. 1508) of one of the employees against whom the threats were made (P.A. 796).

activity was not the cause of their discharge, and that the company in the past had always been careful not to employ persons guilty of violence (4A. 104-109; 2A. 1121-1122).

Several exhibits, consisting of reports of third persons, offered by the company to show not the truth or falsity of the matters therein set forth but the basis upon which the company's officials acted, which had been rejected by the Examiner, were admitted by the Board (P.A. 778), but competent oral testimony to show such basis, with respect to various complainants, was excluded (P.A. 403-404, 410-413; 1A. 312-313, 334, 354, 359, 361, 362, 407; 2A. 1122).

The company attempted with almost no success to establish the criminal backgrounds of the Teamsters and certain of its officers. On the limited evidence which was admitted, the lower court described the past violences as "disgraceful" and as reflecting "seriously on the participants and even on members of the union, who, though themselves innocent, did not eject the criminal or disorderly element that ruled or tried to rule the local union," but added that "the rough, illegal actions of the unions in other fields were—so it is argued and found by the Board—not characteristic of the efforts of the union which respondent was opposing in 1940" (130 F. 2d 482). But if the company had been permitted, it would have shown not only past lawlessness, but current as well, and the relation thereof to the company's motives in dealing with its employees (4A. 60-76, 185-186, 271-287).[10] The entire view of the lower court that no excluded evidence related to the four-year period prior to the strike is wholly inaccurate. An analysis of the excluded and otherwise avail-

[10] Some of the prior lawlessness is reflected in decisions of the Indiana Supreme Court—*Crickmore v. State*, 213 Ind. 586, 12 N. E. 2d 266, and *Peats v. State*, 213 Ind. 560, 12 N. E. 2d 270. The facts found in the *Crickmore* and *Peats* cases definitely involved Emmett Joseph Williams, who

able testimony on the point appears in the company's petition for rehearing (4A. 271-287).

3. *Motive in discharging other employees and in not reinstating all complaining employees.* In addition to the company's efforts to show the character of the Teamsters it sought to prove a conspiracy among the Teamsters, its ally the Federal, and the complainants herein, to use unlawful methods in connection with the strike, including the obstruction of the conduct of the company's business (4A. 118-150), but despite a clear statement of the company's position by counsel,[11] the Examiner adhered consistently to the view that such evidence was irrelevant and immaterial, and reaffirmed this position in his intermediate report as follows:

> "Respondent's offer of testimony to establish a conspiracy among, and the alleged general reputation for violence in strikes of, the Teamsters Union's officers, organizers, business agents, mem-

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was an officer of the Teamsters at the time of the strike and hearing herein in 1939, as a conspirator in the unlawful acts there related. His testimony played an important part in the result of this proceeding (P.A. 42-79; 1A. 1-15).

[11] "MR. PANTZER: Mr. Examiner, I should like to say a word or two there, please. I am very glad, I am very grateful, to Mr. Weiss for having stated so bluntly in this court room that the union is not on trial in this proceeding, because it is a statement that the Trial Examiner has made to me at least a half dozen times during various recesses which he has declared in this proceeding. * * * I wish to state that we make no contention that the union is on trial in this proceeding, because very obviously under the provisions of the National Labor Relations Act the employer has no affirmative redress against the union. But we do contend that since the United States Supreme Court in the *Fansteel Case* has clarified what the issues are, the crimes, the violence, the threats, the plans of harm of the union are admissible in evidence upon the issue as to whether or not those crimes, those violences, those plans, or intent, had any effect upon the employer with respect to the employer's action toward his employees. * * * Therefore, the unlawful union activities, although they be not on trial in this case, are properly the subject matter of the research of this Examiner and this record, and I think the Examiner should help us in this case to get

> bers formerly employed by it, and other members not employed by it, to obstruct the free flow of respondent's products in interstate commerce, was denied on the grounds of its irrelevancy and immateriality" (P.A. 591).

The Examiner's action was approved by the Board on the ground that in the absence of criminal convictions or prosecutions, evidence of law violations need not be received.[12] Evidently, therefore, the evidence, which was clearly relevant and material, was excluded because the Board has decided upon a new rule of exclusion having nothing to do with relevancy and materiality, namely, that the Board cannot be bothered with an inquiry into unprosecuted crimes against an employer even though such crimes are the basis of discharge or of refusal to reinstate complaining employees and are so pleaded, as the employer may apply to other tribunals for redress of such wrongs. Such rule, of course, is utterly unsound. *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U. S. 240, 252, 254; *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31; *N.L.R.B. v. Indiana & Michigan Electric Company, supra.* Cf. *N.L.R.B. v. Sands Manufacturing Company*, 306 U. S. 332, 324. This point was ignored by the lower court.

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[12] Said the Board: "The Trial Examiner refused to allow the respondent to introduce evidence which it claimed would establish violations by strikers of Federal and State laws, where there were no convictions or prosecutions to show that the laws in question had in fact been violated. We have affirmed his ruling. We do not believe that the policies of the Act would be effectuated were we to constitute ourselves a tribunal to receive evidence, and render judgment concerning alleged violations of other Federal or State laws" (P.A. 829). Even under this view, Moneymaker and four of the striking employees were not entitled to reinstatement as they were actually prosecuted and found guilty of assault and battery (P.A. 830).

The Board has heretofore suggested that Section 6 of the Norris-LaGuardia Act, 29 U.S.C.A. Sec. 106, prevents holding all the complainants responsible for the acts of violence committed by some of them pursuant to any conspiracy (4A. 239-241) and that, even "were we to give full weight to the respondent's offers of proof on the excluded evidence, which it claims establishes the illegal conspiracy, the record would show no more than that the employees conspired to strike in protest against the respondent's unfair labor practices. Their right to do so is fully protected by the Act" (4A. 238). Even if the Norris-LaGuardia Act is applicable to a proceeding under the Wagner Act, which is doubtful, the question of such applicability could not have been decided upon the record herein because the Examiner's rejection of all evidence of what occurred at the strike meetings, much of which the company sought to elicit on cross-examination of Board witnesses, prevented the company from proving "actual participation in, * authorization * or ratification" of, force and violence. And of course no offer of proof was made or required in connection with the cross-examination and was not and could not have been considered by the Board.

Although the granting of a petition to adduce additional evidence of matters arising after trial is discretionary, we submit that with respect to proper evidence excluded during the trial no discretion exists, but such petition must be granted as a matter of right.

4. *Motive in not bargaining with Teamsters.* The rejected evidence showing the background of the unions and their unlawful methods was relevant to the issue of the company's motive in not bargaining with the Teamsters without a prior determination that the Teamsters was the

representative of the employees eligible to vote and be represented in a proper bargaining unit. Moreover, the decision conflicts with *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Standard Lime & Stone Co. v. N.L.R.B.*, 97 F. 2d 531, in holding that Acme-Evans Company was guilty of a refusal to bargain with the Teamsters. Under those cases, striking employees who had already been guilty of violence or threats of, or conspiracy to commit, violence were not to be included in the determination of the union's majority. No demand for bargaining was made prior to the strike (P.A. 44, 45). The company, by a blanket pronouncement, discharged all employees implicated or participating in the violence of the strike (P.A. 545-546). Furthermore, in the light of the Teamsters' general reputation for violence in its organizational activities, evidence of which was excluded as above pointed out, the company had reasonable doubt whether the members had joined voluntarily or through coercion.[13] And the unions vigorously threatened to stop the company's business.[14] In view of such threats, themselves giving some indication of the character of the unions, the company had a right to a determination of the Teamsters' representation (*N.L.R.B. v. Dahlstrom, etc. Co.*, 112 F. 2d. 756,

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[13] One of the employees, who did not join, was threatened: "If you want to continue to live in Indianapolis you had better join the union" (1A. 602); "if you tell anyone I'll make it plenty hot for you" (3A. 1508); and "if you don't sign and you tell, it will be too bad for you" (3A. 1508-9); and another employee was told "you are going to sign one of these cards—you are, or I will beat the hell out of you" (2A. 982); "If you get up there and testify on the 14th, I'll get you again, and the union will back me up in it" (3A. 1456; 2A. 986).

[14] "We will tie up your entire plant. We will tie up your shipments going to other warehouses" (P.A. 426, 1A. 326-327). "If they (unions) had to stop our trucks they would do it" (1A. 251; P.A. 399). "We will stop every shipment out of your place" (*ibid*). "We will throw a string around you" (P.A. 400). (And the blockade of the company's plant was so complete that deliveries were reduced to a fraction, 3A. 1512-1515.)

758). Such character is further indicated by the fact that one witness was so intimidated that he was afraid to testify (2A. 1267).

5. *Evidence as to whether enforcement will effectuate the policies of the Act.* The additional and rejected evidence set forth in the petition for leave to adduce (4A. 183-212) and the petition for rehearing (4A. 264-300) shows that the Board's findings of fact and conclusions of law were based alone upon the face of the medal. Upon the face it appears that the acts of the company's executives were motivated by a desire to subvert a proper and legal association of its employees. The reverse of the medal has not been made to appear—the reputation, lawlessness and conspiracy of the unions. The company has not yet had an opportunity, either by direct or cross-examination, fully to interrogate the union leaders and to show their plan to force organization of the company's employees not only upon the company but upon the employees as well, by threats and acts of violence of serious proportions, and has not been given the opportunity to establish the evil reputation of the Teamsters in pursuit of its organizational ends. To force the company to reinstate members of the two unions and to bargain with the Teamsters will not effectuate the policies of the Act. So doing will only cause the unions and the members to have contempt for following the processes of collective bargaining when such processes may so easily be anteverted and anticipated by the mechanism of threats, violence and conspiracy to destroy.

II. The Board has admitted that "the practice of the Board at the time of the hearing was to require counsel for the employer, but not to require Board counsel, to submit to the Trial Examiner applications for subpoenas

which they desired during the course of the hearing, specifying the names of the witnesses and the nature of the facts to be proved by them" (4A. 228).

During the hearing, counsel for the company submitted several applications for subpoenas, some of which were denied, as stated by the lower court. That court's conclusion that the company was not prejudiced by the Board's practice is necessarily based on speculation, especially in light of the circumstance that prior cross-examinations of the witnesses sought by the subpoenas had been curtailed by the Examiner. Indeed, the court had previously held that a showing of actual prejudice from the unequal treatment was not required. *Inland Steel Co. v. N.L.R.B.*, 109 F. 2d 9, 19-20.

The requirement of procedural due process has not been met.

Conclusion

Petitioner respectfully submits that the writ should be granted.

KURT F. PANTZER,
CHARLES M. WELLS,

Counsel for Petitioner.